

UNITED STATES DISTRICT COURT**EASTERN DISTRICT OF WASHINGTON**

JONAH M. FIGUEROA,

Plaintiff,

vs.

CAROLYN W. COLVIN,

Acting Commissioner of Social Security,

Defendant.

No. 2:15-cv-00139-MKD

**ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

ECF Nos. 14, 19

BEFORE THE COURT are the parties' cross-motions for summary judgment. ECF Nos. 14, 19. The parties consented to proceed before a Magistrate Judge. ECF No. 7. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, the Court denies Plaintiff's motion (ECF No. 14) and grants Defendant's motion (ECF No. 19).

JURISDICTION

The Court has jurisdiction over this case pursuant to 42 U.S.C. § 1383(c)(3).

STANDARD OF REVIEW

A district court's review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited; the Commissioner's decision will be disturbed "only if it is not supported by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted). In determining whether the standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. If the evidence in the record "is susceptible to more than one rational interpretation, [the court] must uphold the ALJ's findings if they are supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court "may not reverse an ALJ's decision on account of an error that is harmless."

1 *Id.* An error is harmless “where it is inconsequential to the [ALJ’s] ultimate
2 nondisability determination.” *Id.* at 1115 (quotation and citation omitted). The
3 party appealing the ALJ’s decision generally bears the burden of establishing that
4 it was harmed. *Shineski v. Sanders*, 556 U.S. 396, 409-410 (2009).

5 **FIVE-STEP EVALUATION PROCESS**

6 A claimant must satisfy two conditions to be considered “disabled” within
7 the meaning of the Social Security Act. First, the claimant must be “unable to
8 engage in any substantial gainful activity by reason of any medically determinable
9 physical or mental impairment which can be expected to result in death or which
10 has lasted or can be expected to last for a continuous period of not less than twelve
11 months.” 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant’s impairment must be
12 “of such severity that he is not only unable to do his previous work[,] but cannot,
13 considering his age, education, and work experience, engage in any other kind of
14 substantial gainful work which exists in the national economy.” 42 U.S.C. §
15 1382c(a)(3)(B).

16 The Commissioner has established a five-step sequential analysis to
17 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §
18 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s work
19 activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in “substantial
20

1 gainful activity,” the Commissioner must find that the claimant is not disabled. 20
2 C.F.R. § 416.920(b).

3 If the claimant is not engaged in substantial gainful activity, the analysis
4 proceeds to step two. At this step, the Commissioner considers the severity of the
5 claimant’s impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers from
6 “any impairment or combination of impairments which significantly limits [his or
7 her] physical or mental ability to do basic work activities,” the analysis proceeds to
8 step three. 20 C.F.R. § 416.920(c). If the claimant’s impairment does not satisfy
9 this severity threshold, however, the Commissioner must find that the claimant is
10 not disabled. *Id.*

11 At step three, the Commissioner compares the claimant’s impairment to
12 severe impairments recognized by the Commissioner to be so severe as to preclude
13 a person from engaging in substantial gainful activity. 20 C.F.R.
14 § 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the
15 enumerated impairments, the Commissioner must find the claimant disabled and
16 award benefits. 20 C.F.R. § 416.920(d).

17 If the severity of the claimant’s impairment does not meet or exceed the
18 severity of the enumerated impairments, the Commissioner must pause to assess
19 the claimant’s “residual functional capacity.” Residual functional capacity (RFC),
20 defined generally as the claimant’s ability to perform physical and mental work

1 activities on a sustained basis despite his or her limitations, 20 C.F.R.

2 § 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

3 At step four, the Commissioner considers whether, in view of the claimant's
4 RFC, the claimant is capable of performing work that he or she has performed in
5 the past (past relevant work). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is
6 capable of performing past relevant work, the Commissioner must find that the
7 claimant is not disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of
8 performing such work, the analysis proceeds to step five.

9 At step five, the Commissioner considers whether, in view of the claimant's
10 RFC, the claimant is capable of performing other work in the national economy.
11 20 C.F.R. § 416.920(a)(4)(v). In making this determination, the Commissioner
12 must also consider vocational factors such as the claimant's age, education and
13 past work experience. *Id.* If the claimant is capable of adjusting to other work, the
14 Commissioner must find that the claimant is not disabled. 20 C.F.R. §
15 416.920(g)(1). If the claimant is not capable of adjusting to other work, analysis
16 concludes with a finding that the claimant is disabled and is therefore entitled to
17 benefits. *Id.*

18 The claimant bears the burden of proof at steps one through four above.
19 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
20 step five, the burden shifts to the Commissioner to establish that (1) the claimant is

1 capable of performing other work; and (2) such work “exists in significant
2 numbers in the national economy.” 20 C.F.R. § 416.920(c)(2); *Beltran v. Astrue*,
3 700 F.3d 386, 389 (9th Cir. 2012).

4 **ALJ’S FINDINGS**

5 Plaintiff applied for Title XVI supplemental security income benefits on
6 October 13, 2010, alleging a disability onset date of October 1, 2007. Tr. 175-183.
7 The application was denied initially, Tr. 104-107, and on reconsideration, Tr. 84-
8 96. Plaintiff appeared at a hearing before an Administrative Law Judge (ALJ) on
9 December 17, 2013. Tr. 31-57. On January 23, 2014, the ALJ denied Plaintiff’s
10 claim. Tr. 11-30.

11 At step one, the ALJ found that Plaintiff has not engaged in substantial
12 gainful activity since September 30, 2010. Tr. 16. At step two, the ALJ found
13 Plaintiff has the following severe impairments: asthma and anxiety. Tr. 16. At
14 step three, the ALJ found that Plaintiff does not have an impairment or
15 combination of impairments that meets or medically equals a listed impairment.
16 Tr. 20. The ALJ then concluded that Plaintiff has the RFC to perform light work,
17 with the following non-exertional limitations:

18 He can lift and carry 20 pounds occasionally and 10 pounds frequently.
19 There is no limit on standing but he should avoid walking more than 4
20 blocks at a time. He should avoid climbing ladders, ropes, and scaffolds, but
is capable of occasionally climbing ramps or stairs, no more than two flights
at a time. He should avoid concentrated exposure or odors, dust, gases,
fumes, perfumes, and environmental irritants. He should avoid extreme

1 temperatures and humidity. He is capable of no more than superficial contact
2 with the general public and with coworkers.

3 Tr. 21. At step four, the ALJ found that Plaintiff is unable to perform relevant past
4 work. Tr. 25. At step five, the ALJ found that, considering Plaintiff's age,
5 education, work experience and RFC, there are jobs in significant numbers in the
6 national economy that Plaintiff could perform, such as bottle labeler or production
7 assembler. Tr. 25-26. On that basis, the ALJ concluded that Plaintiff is not
8 disabled as defined in the Social Security Act. Tr. 26.

9 On April 3, 2015, the Appeals Council denied review, making the
10 Commissioner's decision final for purposes of judicial review. *See* 42 U.S.C.
11 1383(c)(3); 20 C.F.R. §§ 416.1481, 422.210.

12 ISSUES

13 Plaintiff seeks judicial review of the Commissioner's final decision denying
14 him supplemental security income benefits under Title XVI of the Social Security
15 Act. ECF No. 14. Plaintiff raises the following issues for this Court's review:

- 16 1. Whether the ALJ properly discredited Plaintiff's symptom claims; and
- 17 2. Whether the ALJ properly weighed the medical opinion evidence.

18 ECF No. 14 at 10.

DISCUSSION

A. Adverse Credibility Finding

First, Plaintiff faults the ALJ for failing to provide specific findings with clear and convincing reasons for discrediting his symptom claims. ECF No. 14 at 11-16.

An ALJ engages in a two-step analysis to determine whether a claimant's testimony regarding subjective pain or symptoms is credible. "First, the ALJ must determine whether there is objective medical evidence of an underlying impairment which could reasonably be expected to produce the pain or other symptom alleged." *Molina*, 674 F.3d at 1112 (internal quotation marks omitted). "The claimant is not required to show that [his] impairment could reasonably be expected to cause the severity of the symptom [he] has alleged; [he] need only show that it could reasonably have caused some degree of the symptom." *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) (internal quotation marks omitted).

Second, "[i]f the claimant meets the first test and there is no evidence of malingering, the ALJ can only reject the claimant's testimony about the severity of the symptoms if she gives 'specific, clear and convincing reasons' for the rejection." *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (internal citations and quotations omitted). "General findings are insufficient; rather, the ALJ must identify what testimony is not credible and what evidence undermines

1 the claimant's complaints." *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th
2 Cir. 1995)); *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002)("[T]he ALJ
3 must make a credibility determination with findings sufficiently specific to permit
4 the court to conclude that the ALJ did not arbitrarily discredit claimant's
5 testimony."). "The clear and convincing [evidence] standard is the most
6 demanding required in Social Security cases." *Garrison v. Colvin*, 759 F.3d 995,
7 1015 (9th Cir. 2014) (quoting *Moore v. Comm'r of Soc. Sec. Admin.*, 278 F.3d 920,
8 924 (9th Cir. 2002)).

9 In making an adverse credibility determination, the ALJ may consider, *inter*
10 *alia*, (1) the claimant's reputation for truthfulness; (2) inconsistencies in the
11 claimant's testimony or between his testimony and his conduct; (3) the claimant's
12 daily living activities; (4) the claimant's work record; and (5) testimony from
13 physicians or third parties concerning the nature, severity, and effect of the
14 claimant's condition. *Thomas*, 278 F.3d at 958-59.

15 This Court finds the ALJ provided specific, clear, and convincing reasons
16 for finding that Plaintiff's statements concerning the intensity, persistence, and
17 limiting effects of his symptoms were "not entirely credible." Tr. 22.

18 *1. Inconsistent Statements*

19 The ALJ found that Plaintiff's credibility was undermined by his
20 inconsistent statements regarding the reason he stopped working and the severity

1 of his impairments. Tr. 22. In evaluating credibility, the ALJ may consider
2 inconsistencies in Plaintiff's testimony or between his testimony and his conduct.
3 *Thomas*, 278 F.3d at 958-59; *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996)
4 (in making a credibility evaluation, the ALJ may rely on ordinary techniques of
5 credibility evaluation).

6 For example, the ALJ observed that Plaintiff testified he stopped working
7 "due to his own health problems," Tr. 41, but the record indicated he previously
8 told Dr. McRae in June 2008 that "he stopped working because of his mother's
9 health problems and made no mention of his own." Tr. 22 (referring to Tr. 251).

10 The ALJ further noted that Plaintiff "generally portrayed himself as
11 extremely limited with regard to his asthma, with multiple uses of medications
12 every day and multiple emergency room visits." Tr. 23. The ALJ identified
13 inconsistencies in the record regarding these allegations. Specifically, the ALJ
14 observed that the Plaintiff "reported using his nebulizer all day long," Tr. 23 (citing
15 Tr. 283). However, the ALJ noted that "just two months earlier...[Plaintiff]
16 reported only three breathing treatments per day." Tr. 23 (citing Tr. 311).
17 Similarly, Plaintiff inconsistently reported his emergency room visits to treat his
18 asthma. Tr. 23. For example, in July 2010, Plaintiff reported two emergency room
19 visits in the past six months, but in fact he had not been to the emergency room
20 since 2001. Tr. 23 (citing Tr. 260, 280). It appears as though Plaintiff visited the

1 emergency room on one occasion, in December 2013, which-as Defendant
2 notes-was 16 days before his hearing. Tr. 23 (citing Tr. 364-374); ECF No. 19 at
3 6. Plaintiff's inconsistent statements were a clear and convincing reason to
4 discredit his testimony.

5 *2. Reason for Stopping Work*

6 The ALJ noted that Plaintiff stopped working for reasons that were unrelated
7 to his physical impairments. Tr. 22. When considering a claimant's contention
8 that he cannot work because of his impairments, it is appropriate to consider
9 whether the claimant has not worked for reasons unrelated to his alleged disability.
10 *See Bruton v. Massanari*, 268 F.3d 824, 828 (9th Cir. 2001) (the fact that the
11 claimant left his job because he was laid off, rather than because he was injured,
12 was a clear and convincing reason to find him not credible); *Tommasetti v. Astrue*,
13 533 F.3d 1035, 1040 (9th Cir. 2008) (the ALJ properly discounted claimant's
14 credibility based, in part, on the fact that the claimant's reason for stopping work
15 was not his disability). Here, as noted *supra*, the ALJ observed Plaintiff told Dr.
16 McRae during a psychological assessment that he stopped working because of his
17 mother's health problems and made no mention of his own health problems. Tr.
18 22 (referring to Tr. 251). This was a clear and convincing reason to discredit
19 Plaintiff's testimony.

1 3. *Evidence of Exaggeration*

2 The ALJ discounted the Plaintiff's testimony because at least two physicians
3 suggested the Plaintiff exaggerated his symptoms. Tr. 23. The tendency to
4 exaggerate is a permissible reason for discounting a Plaintiff's credibility. *See*
5 *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001) (the ALJ appropriately
6 considered Plaintiff's tendency to exaggerate when assessing Plaintiff's credibility,
7 which was shown in a doctor's observation that Plaintiff was uncooperative during
8 cognitive testing but was "much better" when giving reasons for being unable to
9 work.); *see also Thomas*, 278 F.3d at 959 (An ALJ may properly rely on a
10 claimant's efforts to impede accurate testing of a claimant's limitations when
11 finding a claimant less than credible).

12 The ALJ noted that examining psychologist Dr. Arnold reported that
13 Plaintiff's "PAI [personality assessment inventory] was deemed questionably
14 valid, as there were subtle suggestions he attempted to portray himself in a
15 negative or pathological manner in a particular areas." Tr. 23 (citing Tr. 314).
16 And, "Dr. Arnold noted a dramatic presentation with exaggerated expression and
17 over-reaction, vague responses, and unsupported symptomatology, summarizing
18 that the claimant gave the appearance that he was attempting negative impression
19 management, for which Dr. Arnold recommended TOMM to rule out cognitive
20 malingering." Tr. 23 (citing Tr. 321, 323). The ALJ noted that another medical

1 provider, Dr. Chandler had identified inconsistent statements made by Plaintiff
2 during an evaluation, which the ALJ found further called into question his
3 credibility. Tr. 23 (citing Tr. 295-296).

4 Because an ALJ may account for a Plaintiff's exaggeration of symptoms and
5 interference during an evaluation in assessing credibility, this was specific, clear
6 and convicting reason to discredit his testimony.

7 *4. Improvement with Medication*

8 The ALJ found the Plaintiff's claims lacked credibility because the Plaintiff
9 improved with medication. Tr. 23. An ALJ may rely on examples of "broader
10 development" of improvement when finding a claimant's testimony not credible.
11 *Garrison*, 759 F.3d at 1017-18. Moreover, the effectiveness of medication and
12 treatment is a relevant factor in determining the severity of a claimant's symptoms,
13 20 C.F.R. § 404.1529(c)(3), 416.929(c)(3); *see Warre v. Comm'r of Soc. Sec.*
14 *Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006) (Conditions effectively controlled
15 with medication are not disabling for purposes of determining eligibility for
16 benefits) (internal citations omitted); *see also Tommasetti*, 533 F.3d at 1040 (a
17 favorable response to treatment can undermine a claimant's complaints of
18 debilitating pain or other severe limitations).

19 The ALJ observed that "treatment records consistently demonstrate
20 improvement on medications alone." Tr. 23. The ALJ noted that "in May 2011,

1 medications definitely helped; in January 2010, doing okay; in May 2012, well
2 controlled, in March 2013, mentally stable, and ... in October 2013, stable.” Tr.
3 23 (citing Tr. 319-334).

4 Because an ALJ may find impairments that can be controlled with
5 medication are not disabling, the ALJ did not err when he found Plaintiff’s
6 symptom complaints less than credible.

7 *5. Noncompliance with Recommended Treatment*

8 The ALJ found that Plaintiff’s was not compliant with his treating
9 physician’s recommended treatment. Tr. 23. Despite improvement with
10 medication, the ALJ observed that the Plaintiff was “not compliant with treatment
11 recommendations.” Tr. 23.

12 Plaintiff’s failure to follow a prescribed course of treatment is a permissible
13 reason to discredit his testimony. *See Molina*, 674 F.3d at 1113 (“We have long
14 held that, in assessing a claimant’s credibility, the ALJ may properly rely on
15 unexplained or inadequately explained failure ... to follow a prescribed course of
16 treatment.”). The ALJ found that

17 Despite being told not use his inhaler up to 10 times a day by Nurse
18 Vecchio... as this was contributing to his anxiety, records indicate he
19 continued to report this level of use and Dr. Green described him as non-
20 compliant with asthma controlling medications ... Nurse Vecchio likewise
reported... that he was very adverse to using inhaled corticosteroids, had
missed his first appointment with the pulmonologist, and had not sought
help from a mental health provider for his anxiety despite being encouraged
to do so. Indeed, in a public assistance benefits evaluation in November

1 2012 ... he admitted he stopped taking the Klonopin and his anxiety had
2 worsened as a result and ... in September 2012, he admitted he did not like
to use medications despite stating they were helpful.

3 Tr. 23 (citing Tr. 256, 295, 347, 359, 358, 260-290.)

4 Plaintiff contends he was noncompliant with certain treatment
5 recommendations because he could not afford them. ECF No. 14 at 13. A
6 claimant's inability to afford treatment should not cast doubt on his credibility.
7 *Regennitter v. Comm'r Soc. Sec. Admin.*, 166 F.3d 1294, 1296 (9th Cir. 1999).
8 However, the record indicates that Plaintiff's non-compliance with his treatment
9 plan was not the result of lack of access. Here, the ALJ acknowledged that
10 Plaintiff was without insurance for a period and specifically noted issues of
11 noncompliance not related to lack of insurance. Tr. 23. For example, Plaintiff was
12 over-using his prescribed albuterol inhaler. Tr. 23, 256, 295, 347, 359. The
13 Plaintiff missed an appointment with a pulmonologist. Tr. 23, 283. And, he
14 refused to see a mental health provider, despite a referral from Nurse Vecchio to a
15 low-cost option. Tr. 23, 284. As the ALJ noted, the Plaintiff admitted that he did
16 not like to take medication, despite its effectiveness. Tr. 23, 253. In his testimony,
17 the Plaintiff said of medication "I don't like the way they make me feel, so I
18 choose to not take them." Tr. 44. Plaintiff's behavior is not consistent with being
19 unable to comply with his treatment plan due to financial constraints. Instead, the
20 ALJ reasonably interpreted the behavior as indicative of voluntary noncompliance,

1 which was a permissible reason for the ALJ to discount the Plaintiff's reported
2 symptoms.

3 *6. Activities of Daily Living*

4 Finally, the ALJ found that Plaintiff's daily activities were inconsistent with
5 the severe limitations Plaintiff alleged and indicated the ability to persist at simple
6 tasks and tolerate routine social interactions. Tr. 23. A claimant's reported daily
7 activities can form the basis for an adverse credibility determination if they consist
8 of activities that contradict the claimant's "other testimony" or if those activities
9 are transferable to a work setting. *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir.
10 2007); *see also Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989) (daily activities
11 may be grounds for an adverse credibility finding "if a claimant is able to spend a
12 substantial part of his day engaged in pursuits involving the performance of
13 physical functions that are transferable to a work setting."). "While a claimant
14 need not vegetate in a dark room in order to be eligible for benefits, the ALJ may
15 discredit a claimant's testimony when the claimant reports participation in
16 everyday activities indicating capacities that are transferable to a work setting" or
17 when activities "contradict claims of a totally debilitating impairment." *Molina*,
18 674 F.3d at 1112-13 (internal quotation marks and citations omitted).

19 The ALJ observed that the Plaintiff's "reported activities of daily living are
20 independent, and include a variety of household chores, cooking, shopping,

1 attending school at one point and doing homework, and visiting with friends and
2 family, despite his allegations ... that he is unable to prepare meals or shop
3 independently.” Tr. 23. These activities are inconsistent with Plaintiff’s
4 complaints that he is unable to perform a basic job because it will overexert him.
5 Tr. 43. Basic cooking, tidying, shopping and socializing demonstrate that Plaintiff
6 is capable of some activity throughout the day without becoming overexerted.
7 Plaintiff was working on his GED. Tr. 43. This is inconsistent with his allegation
8 that he doesn’t work, in part, because he has a “comprehension problem.” Tr. 45.
9 The evidence of Plaintiff’s daily activities in this case may be interpreted more
10 favorably to the Plaintiff, however, such evidence is susceptible to more than one
11 rational interpretation, and therefore the ALJ’s conclusion must be upheld. *See*
12 *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005). Here, Plaintiff’s daily
13 activities were reasonably considered by the ALJ to be inconsistent with the
14 Plaintiff’s allegations of disabling functional limitations. Even assuming that the
15 ALJ erred in relying on Plaintiff’s daily activities, any error is harmless because, as
16 discussed *supra*, the ALJ offered sufficient additional reasons, supported by
17 substantial evidence, for the ultimate adverse credibility finding. *See Carmickle v.*
18 *Comm’r of Soc. Sec. Admin*, 533 F.3d 1155, 1162-63 (9th Cir. 2008).

B. Medical Opinion Evidence

Plaintiff faults the ALJ for discrediting the medical opinions of Pamela Vecchio, A.R.N.P.; John Arnold, Ph.D.; and W. Scott Mabee, Ph.D. ECF No. 14 at 16-18.

There are three types of physicians: “(1) those who treat the claimant (treating physicians); (2) those who examine but do not treat the claimant (examining physicians); and (3) those who neither examine nor treat the claimant but who review the claimant’s file (nonexamining or reviewing physicians).” *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (brackets omitted). “Generally, a treating physician’s opinion carries more weight than an examining physician’s, and an examining physician’s opinion carries more weight than a reviewing physician’s.” *Id.* “In addition, the regulations give more weight to opinions that are explained than to those that are not, and to the opinions of specialists concerning matters relating to their specialty over that of nonspecialists.” *Id.* (citations omitted).

If a treating or examining physician’s opinion is uncontradicted, an ALJ may reject it only by offering “clear and convincing reasons that are supported by substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). “However, the ALJ need not accept the opinion of any physician, including a treating physician, if that opinion is brief, conclusory and inadequately supported

1 by clinical findings.” *Bray v. Comm’r of Soc. Sec. Admin*, 554 F.3d 1219, 1228
2 (9th Cir. 2009) (internal quotation marks and brackets omitted). “If a treating or
3 examining doctor’s opinion is contradicted by another doctor’s opinion, an ALJ
4 may only reject it by providing specific and legitimate reasons that are supported
5 by substantial evidence.” *Bayliss*, 427 F.3d at 1216 (citing *Lester* 81 F.3d at 830-
6 31).

7 The opinion of an acceptable medical source such as a physician or
8 psychologist is given more weight than that of an “other source.” *See* SSR 06-03p
9 (Aug. 9, 2006), *available at* 2006 WL 2329939 at *2; 20 C.F.R. § 416.927(a).
10 “Other sources” include nurse practitioners, physician assistants, therapists,
11 teachers, social workers, and other non-medical sources. 20 C.F.R. §§
12 404.1513(d), 416.913(d). The ALJ need only provide “germane reasons” for
13 disregarding an “other source” opinion. *Molina*, 674 F.3d at 1111. However, the
14 ALJ is required to “consider observations by nonmedical sources as to how an
15 impairment affects a claimant’s ability to work.” *Sprague v. Bowen*, 812 F.2d
16 1226, 1232 (9th Cir. 1987).

17 *1. Ms. Vecchio*

18 In February 2010, Nurse Vecchio conducted an evaluation of Plaintiff and
19 opined that Plaintiff’s asthma severely limited his ability to work. Tr. 301-304.
20 Ms. Vecchio observed that Plaintiff reported shortness of breath, but found that it

1 was not reasonable to expect the diagnosed medical condition to cause this
2 symptom. Tr. 302. She further explained that Plaintiff was resistant to trying other
3 treatments, Plaintiff had been referred to a pulmonologist, and opined that
4 pulmonology step up therapy would improve Plaintiff's employability. Tr. 302-
5 304. However, even without treatment, she indicated that the recommended
6 limitations would be limited to six months. Tr. 304. The ALJ gave Ms. Vecchio's
7 opinions no weight. Tr. 24.

8 Because Ms. Vecchio is an "other source," the ALJ was required to identify
9 germane reasons for discounting her opinions. *Molina*, 674 F.3d at 1108. The
10 Court finds that the ALJ provided germane reasons for discounting Ms. Vecchio's
11 opinion.

12 First, the ALJ noted that "Nurse Vecchio is not an acceptable medical source
13 as that term is outlined at 20 CFR 416.913 and in Social Security Ruling 06-3p."
14 Tr. 24. An ALJ may give less weight to an other source's opinion because it is not
15 from an "acceptable medical source;" SSR 06-3p, but it would be error to reject her
16 opinion *solely* on this basis. However, the ALJ specifically noted her opinion
17 contradicted that of acceptable medical sources. Tr. 24. To the extent any error
18 occurred, it is harmless in this case because the ALJ gave additional sufficient
19 reasons for rejecting Ms. Vecchio's opinion. *See Carmickle*, 533 F.3d at 1162-63.

1 Second, the ALJ found that “her opinion is not consistent with Dr. Belzer
2 and Dr. Bernardez-Fu.” Tr. 24. Dr. Belzer, a pulmonary disease specialist, opined
3 that Plaintiff was able to walk on flat ground for an unlimited period, Tr. 38-40,
4 which conflicted with Ms. Vecchio’s opinion in February 2010 that Plaintiff was
5 “severely limited,” which is defined as “unable to stand and/or walk.” Tr. 303.
6 Dr. Bernardez-Fu reviewed the Plaintiff’s medical record and concluded that the
7 Plaintiff was not disabled despite having some exertional and postural limitations.
8 Tr. 84-96. Nurse Vecchio’s opinion that the Plaintiff was severely limited by his
9 asthma is in tension with these opinions. Because the opinion of an acceptable
10 medical source is given more weight than that of an “other source,” 20 C.F.R. §§
11 404.1527, 416.927; *Gomez v. Chater*, 74 F.3d 967, 970-71 (9th Cir. 1996), this was
12 a germane reason to reject her opinion.

13 Third, the ALJ found that Ms. Vecchio’s opinion was not consistent “with
14 the objective medical evidence” in the record. Tr. 24. Specifically, Nurse
15 Vecchio’s opinion that Plaintiff was severely limited in his ability to work
16 contradicted medical evidence that Plaintiff’s breathing was normal at rest. Tr.
17 247. Pulmonary tests were consistent with mild obstructive airway disease. Tr.
18 255. An ALJ may discredit treating physicians’ opinions that are conclusory, brief,
19 and unsupported by the record as a whole or by objective medical findings. *Batson*
20 *v. Comm’r, Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004).

1 Fourth, the ALJ discounted Ms. Vecchio's opinion because it "is not
2 consistent ... even with her own opinion in September 2010." Tr. 24. A medical
3 opinion may be rejected by the ALJ if it is conclusory, contains inconsistencies, or
4 is inadequately supported. *Bray*, 554 F.3d at 1228; *Thomas*, 278 F.3d at 957. In
5 September 2010, she reported that "she saw no evidence his asthma interfered with
6 working," when just a few months earlier in February 2010, she had stated "he was
7 capable of sedentary or light work." Tr. 24 (internal citations omitted).
8 Contradictions in a recommendation provide "germane reasons" for rejecting an
9 opinion from an "other source." SSR 06-03p, 2006 WL 2329939 at *2; *Molina*,
10 674 F.3d at 1111. Here, the ALJ provided germane reasons for rejecting Ms.
11 Vecchio's opinion.

12 2. *Dr. Arnold*

13 Dr. Arnold evaluated Plaintiff in July 2010 and again in April 2012. In
14 2010, Dr. Arnold concluded that Plaintiff suffered from symptoms with mild to
15 moderate impact on his ability to perform work activities, however, he opined
16 these would last 6-12 months with rehabilitation. Tr. 310-313. In 2012, Dr.
17 Arnold evaluated Plaintiff, noted his prognosis was good, and opined that Plaintiff
18 was able to remember locations and simple work like tasks; understand, remember
19 and carryout simple verbal and written instructions; to concentrate and attend for
20 short to moderate periods; would be able to ask simple questions, request

1 assistance and accept instructions; adhere to basic standards of neatness and
2 cleanliness, make plans on his own, and be aware of normal hazards and take
3 appropriate precautions. Tr. 321. Dr. Arnold further questioned the veracity of
4 Plaintiff's presentation. Tr. 323. Dr. Arnold noted that Plaintiff had "exaggerated
5 expressions and [he] over-reacted," that Plaintiff's responses were "vague," and
6 that he attempted "negative impression management." Tr. 323. The ALJ gave Dr.
7 Arnold's opinions regarding limitations assessed "limited weight." Tr. 24.

8 Because Dr. Arnold's 2010 opinion was contradicted, the ALJ need only to
9 have given specific and legitimate reasoning supported by substantial evidence to
10 reject that opinion. *Bayliss*, 427 F.3d at 1216. This Court finds that the ALJ
11 properly assigned Dr. Arnold's 2010 assessment of Plaintiff's work limitations
12 opinion minimal weight.

13 Plaintiff challenges the ALJ's consideration of Dr. Arnold's opinions,
14 contending that the ALJ "gave no weight to the mental limitations found by Dr.
15 Arnold in 2010, reasoning that in his 2012 evaluation, Dr. Arnold was concerned
16 about exaggeration." ECF No. 14 at 17. Plaintiff alleges that the ALJ considered
17 Dr. Arnold's 2012 evaluation to the detriment of his 2010 evaluation. *Id.*

18 Here, contrary to Plaintiff's claims, the ALJ considered both Dr. Arnold's
19 2010 and 2012 evaluations, Tr. 19, 24, and noted the indicia of exaggeration for
20 both. In reciting the medical findings, the ALJ noted that in his 2010 evaluation,

1 Dr. Arnold reported that Plaintiff's "PAI was deemed questionably valid, as there
2 were subtle suggestions he attempted to portray himself in a negative or
3 pathological manner in particular areas." Tr. 19. In considering Dr. Arnold's 2012
4 report, the ALJ noted that "Dr. Arnold reported it appeared [the Plaintiff] was
5 attempting negative impression management." Tr. 19. In sum, in both the 2010
6 and 2012 reports, Dr. Arnold questioned the Plaintiff's veracity and the ALJ noted
7 it in her findings.

8 First, the ALJ noted the contradictory and inconsistent nature of Dr.
9 Arnold's opinions. Tr. 24. A medical opinion may be rejected by the ALJ if it is
10 conclusory, contains inconsistencies, or is inadequately supported. *Bray*, 554 F.3d
11 at 1228; *Thomas*, 278 F.3d at 957; *see also Johnson v. Chater*, 87 F.3d 1015, 1018
12 (9th Cir. 1996) (Where a treating physician's opinion is itself inconsistent, it
13 should be accorded less deference). The ALJ noted that Dr. Arnold "opined
14 [Plaintiff] had moderate limits in the ability to interact appropriately with
15 coworkers, supervisors, and in public contacts." Tr. 24. The ALJ went on to
16 explain that Dr. Arnold also opined that Plaintiff was otherwise able to understand,
17 remember, and carry out simple and more complex instructions. Tr. 24. However,
18 in the 2012 opinion, Dr. Arnold assessing limitations included the ability to
19 understand, remember, and carry out simple instructions only, with no social limits
20 whatsoever. Tr. 24. The 2012 opinion essentially provided more substantial

1 limitations on Plaintiff's cognitive functioning, but less limitations on Plaintiff's
2 social functioning, with no explanation for this inconsistency. Moreover, in this
3 second evaluation, "Dr. Arnold recommended TOMM testing to determine if the
4 claimant was cognitively malingering, so limited weight can be given to his
5 opinion on that exam." Tr. 24 (internal quotation marks omitted). The
6 inconsistencies between the assessments, the lack of explanation for the
7 inconsistencies and the identified concern regarding malingering were specific and
8 legitimate reasons to discredit the opinions.

9 Second, Dr. Arnold indicated he expected the limitations assessed in 2010 to
10 last 6 to 12 months, Tr. 24, and the limitations assessed in 2012 to last 6 months,
11 Tr. 321. Temporary limitations are not sufficient to meet the durational
12 requirement for a finding of disability. *See* 20 C.F.R. 416.905(a) (claimant must
13 have impairment expected to last for a continuous period of not less than 12
14 months); 42 U.S.C. § 423(d)(1)(A); *Carmickle*, 533 F.3d at 1165 (affirming ALJ's
15 finding that treating physicians' short term excuse from work was not indicative of
16 "claimant's long term functioning."). This was a specific and legitimate reason to
17 reject the medical opinions.

18 *3. Dr. Mabee*

19 In September 2012, Dr. Mabee examined Plaintiff and opined that Plaintiff
20 had some moderate restrictions on certain work functions, such as: memory

1 impairment, performing activities on a schedule, adapting to changes, making
2 decisions, communicating and performing effectively in a work setting, and
3 maintaining appropriate behavior for work. Tr. 330. Dr. Mabee further opined
4 that the Plaintiff would be impaired for 6-9 months with available treatment. The
5 vocational expert testified that the Plaintiff would be unemployable with the
6 limitations Dr. Mabee found. Tr. 18.

7 First, the ALJ noted that Dr. Mabee assessed moderate limitations in basic
8 work activity, but noted that the assessed limitations were limited to six to nine
9 months. Tr. 24 (citing Tr. 331). Temporary limitations are not sufficient to meet
10 the durational requirement for a finding of disability. *See* 20 C.F.R. 416.905(a)
11 (claimant must have impairment expected to last for a continuous period of not less
12 than 12 months); 42 U.S.C. § 423(d)(1)(A); *Carmickle*, 533 F.3d at 1165
13 (affirming ALJ's finding that treating physicians' short term excuse from work was
14 not indicative of "claimant's long term functioning."). In fact, the ALJ specifically
15 noted that several evaluators limited any limitations to less than 12 months. Tr. 24.
16 This was a specific and legitimate reason to discredit Dr. Mabee's opinion.
17 Second, Dr. Mabee opined that with appropriate treatment and vocational training,
18 Plaintiff would be capable of working. Tr. 24. Thus, Dr. Mabee's opinion does
19 not support Plaintiff's contention he is unable to work. The ALJ did not err in
20 assigning Dr. Mabee's opinion little weight.

1 **CONCLUSION**

2 After review, the Court finds that the ALJ's decision is supported by
3 substantial evidence and free of harmful legal error.

4 **IT IS ORDERED:**

5 1. Plaintiff's motion for summary judgment (ECF No. 14) is **DENIED**.

6 2. Defendant's motion for summary judgment (ECF No. 19) is **GRANTED**.

7 The District Court Executive is directed to file this Order, enter
8 **JUDGMENT FOR THE DEFENDANT**, provide copies to counsel, and **CLOSE**
9 **THE FILE**.

10 DATED this 23rd day of September, 2016.

11 S/Mary K. Dimke
12 MARY K. DIMKE
13 UNITED STATES MAGISTRATE JUDGE
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